The Solicitors' Journal

Vol. 97 December 26, 1953 No. 52

CURRENT TOPICS

Juries and the Death Sentence

THE House of Lords debate on 16th December faithfully reflected the strong revulsion of public sentiment against the proposal in the Report of the Royal Commission on Capital Punishment that juries in murder cases should be asked questions the answers to which would decide whether a prisoner should live or die. Telling points made by VISCOUNT SIMON were: (1) no member of the Commission had ever had the responsibility of trying a case involving a capital charge; (2) murder was not a crime of two degrees, but of infinite variety; (3) "the fact that so foul a crime, whatever the motives, was followed by so dreadful a punishment might well be a necessary mark that the community put on murder . . ."; (4) there was no case in which a jury had been given the business of finding how a man should be punished. EARL JOWITT added that the proposal was impracticable, and great disparity between the decisions of juries would bring the law into disrepute. VISCOUNT TEMPLEWOOD was prepared to accept the proposal as preferable to a "profoundly unsatisfactory" *status quo*, for a trial period of five years, as it was being used in other countries. LORD CHORLEY thought that the sooner the death sentence was removed from our country's penal system the better it would be, and that a jurisprudence in regard to extenuating circumstances in murder could be built. LORD OAKSEY held that the burden of deciding whether a prisoner was guilty was enough for one body of men in one trial. LORD ASQUITH held that it would give rise to a great increase in sentimental clemency. LORD GODDARD pointed out that juries in murder cases could and frequently did return verdicts of manslaughter, and there had been a regrettable increase in the number of disagreements among juries. There might be many more on the question whether a sentence should be death or life imprisonment. The BISHOP OF COVENTRY suggested that a corporate body should examine cases which now come before the Home Secretary. LORD TUCKER was shocked at "the idea of a judge or jury having to go through the terrible ordeal of a second trial." VISCOUNT SAMUEL thought that the system worked very well and was an example of wisdom that resided in common sense. No positive action was required of the prosecution, the jury or the judge, or even of the Home Secretary who only decided whether he should stop the impetus of the law. Viscount Simon expressly refrained from asking for a division, believing that what mattered was not the counting of heads but what was inside heads.

Assessors in the Queen's Bench Division

IN a collision action in the Admiralty Division, two of the Elder Brethren of Trinity House are assigned as assessors to assist the judge. In other types of Admiralty proceeding, too, the help of experts is available to the court, damages being assessed by the registrar and two merchants drawn from a rota, and salvage remuneration being governed, sometimes, by the appraisement of court valuers. But it is not only in maritime matters that the services of a specially qualified assessor may be enlisted in aid of the judge.

CONTENTS

Section 98 of the Judicature Act, 1925, empowers the court in any cause or matter before the High Court or the Court of Appeal, if it thinks it expedient so to do, "to call in the aid of one or more such assessors and try and hear the cause or matter wholly or partially with their assistance." By R.S.C., Ord. 36, r. 43, trials with assessors shall take place in such manner and upon such terms as the court or a judge shall direct. The authorities show that the function of the assessors is to be available for consultation as to the effect and meaning of technical evidence; they are not witnesses, nor are they themselves judges responsible in any way for the decision. Examples of the employment of an assessor in the Queen's Bench Division are to be found in two cases heard by DEVLIN, J., *Waddle* v. *Wallsend Shipping Co., Ltd.* [1952] 2 Ll. L.R. 105, and *Southport Corporation* v. *Esso Petroleum Co., Ltd.* [1953] 3 W.L.R. 773; *ante*, p. 764. The first raised questions of the seaworthiness and structural condition of a ship, the latter concerned matters of seamanship and navigation. The learned judge let it be known on each occasion that he thought it undesirable that questions of that sort should be tried by a Queen's Bench judge without assistance. To avoid inconvenience to the parties and their solicitors and counsel, his lordship did not adjourn the trial so that an assessor could be present, but in the *Southport* case he was advised by an Elder Brother, whose views on the technical evidence are referred to in the judgment. On the subject of this expedient of consultation between assessor and judge out of court, Devlin, J., comments that he doubts whether in any future similar case he will be deterred by the convenience of the parties from adjourning the case so that the assessor may sit at the trial. The moral seems to be that parties to seafaring actions in the landlubbing divisions of the High Court would be well advised to raise the matter of the appointment of an assessor when the mode of trial is discussed on the summons for directions.

Jurisdiction in Nullity: A Scottish Decision

A DOMICILED Englishwoman succeeded in obtaining a decree of nullity in the Court of Session at Edinburgh on 17th December against a domiciled Scotsman. The wife had never been to Scotland, such matrimonial life as she had had having been spent in England. The LORD JUSTICE CLERK said in the course of his judgment that, as the plaintiff was a domiciled Englishwoman, the English courts would be prepared to entertain her action, but in this perplexing chapter of private international law there was nothing which expressly, or even impliedly, prevented him from proceeding on the view that the court of the domicile of a respondent husband had jurisdiction. In actions for nullity the practical exigencies of private international law and the ever varying circumstances of the parties had led to assumptions of jurisdiction by the courts in a rather haphazard way, and it was difficult to relate the decisions to definite principles. There could be little objection to increasing the grounds of jurisdiction for entertaining an action for nullity, provided the court which accepted the jurisdiction was careful to see that the proper law was applied. In the present case there was no doubt that the laws of both Scotland and England, as to the effect of a bigamous marriage, were identical, and so he would grant a decree.

THE SOLICITOR'S NIGHTMARE

AGENCY WORK

"AGENCY work, Mr. Bands, *agency?* I don't understand you," said the County Court Registrar.

The dream of Mr. Bands, Solicitor of the Supreme Court, but consumer of a rather heavy supper before retiring, continued as follows:—

The Registrar: The facts are quite simple. This is the case of the Never-Never Furnishing Co., Ltd. *v.* Sprout. The plaintiffs claim the return of certain furniture under a hire-purchase agreement, on the ground that the defendant is in arrears with his instalments. The defendant has filed a defence, which runs as follows: "The stuff is trash, but if I've got to pay, I can pay £4 a month, Yours sincerely, B. Sprout." The particulars of claim are signed by Messrs. Tort & Co., solicitors, of Chancery Lane. Are you a member of that firm, Mr. Bands?

Mr. Bands: No, sir. My office is next door to the court, as you must know, sir. This is agency work.

R.: Really! Are you familiar with s. 86 of the County Courts Act, 1934, Mr. Bands?

B. (*who has a number of clients in various cases sitting at the back of the court*): Well, yes, sir, in a general sort of way.

R.: Good. Perhaps you will tell me what the section says?

B.: I'm afraid I have not brought my County Court Practice with me to-day, sir, but . . .

R.: Very well. I will tell you. Section 86 provides that any one of four classes may address the court:—

(*a*) Any party to the proceedings. You can hardly be that, as the plaintiff is a limited company.

(*b*) A barrister retained by or on behalf of any party. You are not by any chance a barrister who has forgotten his wig? No?

(*c*) A solicitor acting generally in the proceedings for a party thereto, but not a solicitor retained as an advocate by a solicitor so acting—in other words, solicitors acting generally, but not agents. Are you acting generally?

B.: Sir, Messrs. Tort & Co. are the plaintiffs' solicitors, and this is agency work.

R.: In other words, you are specifically excluded under heading (*c*) of s. 86.

B.: Sir, I've now been able to borrow a County Court Practice. Surely I come under (*d*), viz.: Any other person allowed by leave of the court to appear instead of any party.

R.: Who has given you leave? The learned usher, perhaps? I have not given you leave. You have not even applied for leave.

B.: I beg your pardon, sir, I do now formally apply for leave, under s. 86 (*d*).

R.: Do you think it would be proper when you have, so to speak, been ceremoniously shown out by the front door by (*c*) that I should let you sneak in by the back door under (*d*), in company with a mixed assortment of debtors' wives and debt-collecting clerks in undefended cases? I'm not sure if I ought not to make you disrobe and stand in the witness box.

B.: Sir, if you object to agency work, would you allow me a short adjournment in order that I may file an *ad hoc* notice of change of solicitors?

R.: It is not *I* who object. I am merely carrying out the law. Did I really understand you correctly, that you are inviting me to grant an adjournment so that you can commit an obvious abuse of the process of the court? Would the change of solicitors be a genuine one, or a mere fictitious expedient for evading the provisions of the statute?

B.: Sir, I withdraw my application for an adjournment. Sir, would you excuse me for a moment while I have a word with my articled clerk, who has been trying to attract my attention for some time past? . . . Sir, may I refer you to p. 20 of the Final Report of the Committee on County Court Procedure (Cmd. 7668), dated April, 1949? Part of para. 50 of that report runs as follows: "We understand that at almost every county court there are local solicitors who regularly conduct not only their own cases but also cases sent to them by other solicitors." The reason is, of course, that no counsel or solicitor would think it worth while to make the journey to this court specially for this trifling little case, but if one solicitor can take a dozen or so in a morning, it's worth his while, and everybody benefits.

R.: In other words, I should flout the statute, because (*a*) it is absurd, (*b*) everybody else flouts it? A strange submission, Mr. Bands, from an officer of the Supreme Court!

B.: Furthermore, I submit that s. 86 only limits my right to "address the court." I am not seeking to address you, sir, but merely to call my witness.

R.: What do you suppose you have been doing for the last quarter of an hour but addressing me? How can you appear without addressing me?

B.: Sir, for years past, cases have been openly conducted through agency work in this court, before you and your learned predecessors. If you are suddenly to hold that what was perfectly in order last week is grossly improper to-day, will you not at least hear me as an "other person" under subsection (*d*), just for to-day?

R.: Very well. If you say you are taken by surprise, just for to-day I will allow you to appear as an "other person" under (*d*). Call your witness.

The witness (duly sworn): I produce the hire-purchase agreement. The furniture was not trash. The instalments are in arrear. Unpaid balance is £42 9s.

R.: Very well, the defendant having failed to appear, order for return within one month, suspended so long as defendant pays £4 per month off the unpaid balance of £42 9s. Costs on the summons, no costs of to-day.

B.: No costs of to-day, sir?

R.: The only costs which a party can recover are those incurred by retaining a solicitor or barrister. You are not retained by a party. You are an "other person" under (*d*). No costs of to-day. Next case.

The Registrar tapped impatiently on the bench.

* * * * *

Mr. Bands kicked out wildly and woke his wife.

"Come on, dear," said his wife, "It's the postman knocking. Run down and see what he wants."

Among Mr. Bands' post was a letter from his articled clerk. He opened it. It started: "Dear Mr. Bands, During my present attack of 'flu I have been reading s. 12 (5) of the Hire-Purchase Act, 1938, and on a strict interpretation of this section, surely the Act would be quite unworkable. In future . . ."

Mr. Bands returned to his wife. "I think I'd better go to sleep again," he said.

"ARBO"

PROPER SYSTEM OF WORKING

THE duties of an employer towards his servant in carrying out the employer's work are to exercise due skill and care in providing a competent staff of fellow servants, adequate and suitable plant and material and a proper system of working. There may also be the obligation to observe statutory regulations, but that is distinct from, and additional to, the duties which are imposed on an employer by common law. An exhaustive analysis of each of the above-mentioned duties would involve lengthy consideration, and for the present purpose we will concentrate our attention on the duty of an employer to provide what is known as a "proper" system of working. This is synonymous with a "safe" system, and has never been precisely defined. It has relation to the use of the appliances provided for the work in question and the taking of any necessary precautions to avoid danger. The physical layout of the job—the setting of the stage, so to speak—may be included in the meaning of the phrase "a proper system" of working. For example, in the case of a combined job of demolition and excavation it may be dangerous to begin to excavate before a neighbouring structure is demolished. The decision as to which task is to be performed first lies within the employer's province and is a matter of system. The provision, in proper cases, of warnings and notices and the issue of special instructions may also fall within the meaning of the phrase we are considering.

Before proceeding any further let us remember that the doctrine of "common employment" has been abolished. It is well to remember this fact as some of the former—but by no means, old—authorities involved consideration, among other matters, of this doctrine which has now been happily relegated to the museum of legal antiquities.

In the first place, it is well established that the provision of a safe system of working falls within the employer's province of duty, and if he delegates it, he remains responsible for any inadequacy in the system just as much as if he had personally provided it, and he cannot excuse himself by saying that he had good grounds for relying on the competence of the person to whom he delegated the duty (see *Wilsons and Clyde Coal Co., Ltd.* v. *English* [1938] A.C. 57).

The safety of a system must be considered in relation to the particular circumstances of each job at the relevant time. In *Speed* v. *Thomas Swift and Co., Ltd.* [1943] K.B. 557 the plaintiff was a dock labourer employed by the defendants, who were stevedores, and he was injured by accident while employed in loading a steamship with drums of caustic soda from a barge alongside. The loading was carried out by the use of "married gear," a system by which both the port and starboard winches were used together, the falls of the two winches being attached. On one occasion, the slings used in hoisting the drums of caustic soda were being brought back empty from the hatch to the side of the ship, when the fall from the port winch was released suddenly, and, although the driver of the starboard winch put on steam, a hook caught a section of the ship's rail, with the result that both the section of the rail and a piece of timber lying against the rail fell into the barge, and the plaintiff, who was at work in the barge, was injured. It was held by the Court of Appeal (Lord Greene, M.R., MacKinnon and Goddard, L.JJ.) that, in view of the special circumstances, the section of rail ought to have been removed or so protected that no hook could catch on it, and, therefore, that the employers had failed to provide a safe and proper system of working adapted to the special circumstances. As Goddard, L.J., said in the course of his judgment (at p. 573): "In the use of 'married gear' it is necessary to consider the circumstances of each particular case in deciding whether it is safe to proceed with the rail in position. You cannot lay down a hard and fast rule, but the 'married' system does require the removal (of the rail) as much as the single fall system in certain circumstances, and a careful employer must decide whether

there is danger in leaving the rail in position according to the circumstances which are present. The decision to remove or leave the rail is thus part of the system." It is clear, therefore, that it is the duty of the employer to provide against conditions of danger where such provision can be made.

In *Garcia* v. *Harland and Wolff, Ltd.* [1943] K.B. 731 the defendants undertook the wiring of the 'tween deck of a ship while she was lying in a wet dock. The hatchway in the 'tween deck was left uncovered, and a number of articles, including a fender, a propeller and two piles of hatch covers, were lying round the hatchway, leaving little space for persons to pass. The defendants' foreman considered that it would be dangerous for his men to work there with the hatch covers off the hatchway in the 'tween deck, and he asked the chief officer to put all the covers on that hatchway. The chief officer had the covers put on only two out of the eight compartments of the hatchway. The defendants' foreman, although he considered that the place was not safe for the men to work in unless the whole of the hatchway was covered, made no further request that the covers should be put on the whole of the hatchway, neither did he put on the covers himself, nor did he rig up a lifeline round the hatchway. Two days later it rained, and the ship's officers, to prevent the rain coming through the hatchway and soaking the hold, had the covers put on the hatchway in the main deck immediately overhead. The result was to shut out all light from the hold in which the men were working. The only artificial light provided was so placed as to throw light on the work on which the workmen were engaged, the rest of the deck being in darkness. The plaintiff's husband, who was employed by the defendants on the job, returning to his work after dinner, tripped over the pile of hatch covers, fell into the hold and was killed. It was held by Atkinson, J., that to let the work go on in conditions of almost complete darkness close to this great unfenced hole was allowing the work to proceed under a system which was dangerous, and that there was negligence on the part of the defendants' foreman for which the defendants were clearly liable at common law.

In the foregoing cases, particularly in *Garcia's* case, the risk or danger against which the employers had to make provision was in the nature of something that might reasonably occur, or might be expected to occur. But an employer is not expected to make provision against every possible conceivable danger that may arise in all circumstances. In *Latimer* v. *A.E.C., Ltd.* [1952] 2 Q.B. 701 the plaintiff was employed as a horizontal milling machine operator in the defendants' works. During a certain afternoon, virtually the whole of the defendants' premises became flooded with surface water as the result of an exceptionally heavy fall of rain, followed by the inability of the defendants' surface water drainage system and that of the local authority to carry away the unprecedented volume of water. The flood-water backed up inside the factory and, as a result, an oily cooling agent known as "Mystic," which was pumped along a conduit in the floors, rose and mixed with the water and some of it escaped on to the floors of part of the factory. Consequently, when the flood-waters receded in the course of the afternoon, parts of the factory floors were left more slippery than if they had been in their usual somewhat greasy state. As far as supplies permitted, sawdust was spread on the floor, but some areas were left untreated. The plaintiff, working on a gangway which had not been treated with sawdust, was attempting to load a heavy barrel on to a trolley, when he slipped and injured his ankle. In an action by the plaintiff against his employers, it was held by the Court of Appeal (Singleton, Denning and Hodson, L.JJ.) that the employers had not been negligent, for they had done all that a reasonable employer could be expected to do, bearing in mind the degree of risk involved due to the slippery floor. As Denning, L.J., pointed out in his judgment (at p. 711), it is not sufficient to constitute negligence that there should be a foreseeable risk which the employer can avoid by some measure or other, however extreme. It is always necessary to consider what measures the employer ought to take, and to say whether they can reasonably be expected of him. In the present case the employers knew that the floor was slippery and that there was some risk in letting the men work on it, but, still, they could not reasonably be expected to shut down the whole works and send all the men home. In every case of foreseeable risk, it is a matter of balancing the risk against the measures necessary to eliminate it. It is only negligence if, on balance, the employer did something which he ought not to have done, or omitted to do something which he ought to have done.

On the subject of "laying out" the work to be done, there is the interesting case of *Whitby* v. *Burt, Boulton and Hayward, Ltd., and Another* [1947] K.B. 918. The plaintiff was a steel erector and sheeter's mate employed by certain sub-contractors to carry out work of war damage repair to a factory occupied by the first-named defendants. Along the top of the factory, throughout its length, was a lantern for the purposes of light and ventilation. During the war the lantern had been blacked out. Wooden supports were run horizontally across the interior of the lantern, and above these supports were nailed sheets of corrugated iron. This work had been done in a very slipshod way. The factory had been damaged by enemy action, and the occupiers employed contractors who, in turn, employed sub-contractors to repair the roof of the factory. The occupiers of the factory did not authorise the manner or the method in which the work should be done. That was left to the foreman of the sub-contractors, who directed the plaintiff to ascend to a low-pitched attic in the factory, the horizontal base of which was composed of corrugated iron sheets nailed on to wooden supports, and then to crawl along the sheets and pull out the nails from above, so that the sheets could be removed and used elsewhere in the factory. When the plaintiff had removed most of the nails and sheets, one of the wooden supports, obviously inadequate to bear the weight of a man, broke, and the plaintiff fell to the floor below and was injured. Denning, J., held that the sub-contractors were guilty of negligence in laying out this job, because it was plain that before any man was sent to this small, confined space on the top of these corrugated iron sheets, the most elementary precaution would have been to examine the timbers and examine the situation to see whether they were safe for a man to be sent up there. If these timbers had been inspected by the light of a torch or in any way at all, it would, or should, have been seen that the timbers were not suitable to bear the weight of a man. The failure to make any such examination was negligence at common law on the part of the sub-contractors, who were therefore liable to the plaintiff for the injuries which he had suffered.

When an employer asks his men to work with dangerous substances, he must provide proper appliances to safeguard them; he must set in force a proper system by which the workmen use the appliances and take the necessary precautions, and he must do his best to see that they adhere to it. In *Clifford* v. *Charles H. Challen & Son, Ltd.* [1951] 1 K.B. 495, in 1943 a notice was issued by H.M. Stationery Office about the danger of dermatitis arising from synthetic glue. This notice, since it was issued, had been recognised, both by the manufacturers of the glue and by employers who

used it, as laying down the proper precautions which ought to have been taken when this glue was used. In 1946, the plaintiff went to work in the factory of the defendants, who were manufacturers of radio sets and of pianos, as a trainee. He worked for some six months in the radio cabinet shop and for the remaining three years in the piano fitting shop, where upright pianos were being fitted together. In 1949, the plaintiff suffered from dermatitis, and subsequently brought an action against the defendants, claiming, *inter alia*, that his dermatitis was due to the failure of the employers at common law to make use of a safe system of work. It was common knowledge in these works that there was a danger of dermatitis arising from the use of the synthetic glue and that it was necessary to take precautions against it. The plaintiff himself knew of this danger and the precautions which should be taken. In the radio shop, the notice issued by H.M. Stationery Office was exhibited, and in that shop the recognised prophylactic—in this case "barrier cream"—was provided. But in the piano fitting shop there was no notice, and there was no barrier cream. No containers were provided for fetching it. The barrier cream was kept in the factory store. The plaintiff and the other men in the piano fitting shop could have obtained the cream from the store if they had wished. The foreman of the piano fitting shop did nothing to enforce or encourage the use by the men under his charge of this barrier cream. The Court of Appeal (Cohen, Asquith and Denning, L.JJ.) were of opinion that the employers had not fulfilled their duty by keeping the barrier cream in the store and leaving it for the men to fetch it from the store if they wished. The employers should have at least done in the piano fitting shop the same as they did in the radio shop, that is to say, provide the barrier cream in the shop itself; and the foreman should have seen, as far as he could, that the men used it. The employers were therefore guilty of negligence, but, on the facts of the case, the plaintiff was guilty of contributory negligence. It was held that the plaintiff and his employers should share responsibility in equal proportions, and accordingly the damages (£665) were ordered to be borne by the parties equally.

Finally, a system of work is not devised by telling a man to read certain regulations and not to break them. In *Barcock* v. *Brighton Corporation* [1949] 1 K.B. 339 the plaintiff was employed by the defendant corporation at a sub-station of their electricity undertaking to which the Electricity (Factories Act Special Regulations applied. It became his duty, without supervision, to carry out certain tests in connection with the switchboard. While making these tests, he followed the procedure which his predecessors had adopted, that is to say, instead of following the directions contained in the regulations, he removed entirely the safety device which formed a part of the apparatus. The plaintiff had been supplied with a copy of the regulations and been told that he must make himself conversant with them. One day, while the plaintiff was carrying out work on the switchboard in accordance with his usual practice, an explosion occurred and he was seriously injured. In an action by the plaintiff, it was held by Hilbery, J., that the defendants had not devised a system of work by putting the regulations into the plaintiff's hands and telling him to read them. No responsible person on behalf of the defendants had devised any system for doing this particular work. That being so, the defendants were liable at common law for negligence, and the plaintiff was entitled to damages.

M.

CUSTODY AND THE PUTATIVE FATHER

In the Clerkenwell Magistrates' Court recently the learned magistrate (Mr. Frank Powell) made an order under s. 1 of the Guardianship of Infants Act granting custody of an illegitimate child to the father. According to the brief report of the case (in *The Times* of 30th October, 1953), the magistrate said that he realised that the general opinion of lawyers was that the Act did not apply to illegitimate children and that the decision gave the father of an illegitimate child rights he did not possess at common law.

Section 1 of the Guardianship of Infants Act, 1925, under which this order is reported to have been made, sets out the principles on which questions relating to custody and upbringing of infants are to be decided: "The court . . . shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody . . . is superior to that of the mother, or the claim of the mother is superior to that of the father."

In the absence in the report of any facts or reasons given by the magistrate, it is presumed that the decision to give the father custody was dictated by considerations of welfare of the child, irrespective of the wishes of the mother should they have been contrariwise.

In the light of this decision it becomes pertinent to consider the putative father's rights at common law. Halsbury, vol. 3 (3rd ed., 1953), p. 109, para. 169, states them as follows: "Unless he has obtained an adoption order the father has no right to the custody of the child even though he is in a better position to maintain it and he cannot appoint a guardian for it by will. Whenever he is in lawful custody of the child the court will protect his right."

The general principle thus enunciated is illustrated in the old case of *R.* v. *Hopkins* (1806), 7 East 579, in which it was held that the court will grant a *habeas corpus* to bring up the body of a bastard child within the age of nurture for the purpose of restoring it to the custody of the mother, from whose quiet possession it has been taken, at one time by fraud, and afterwards by force; and this without prejudice to the question of guardianship, which belongs to the Lord Chancellor representing the Queen in Chancery. If a putative father obtains possession of the child by fraud alone he will be compelled to restore it to the mother (*R.* v. *Soper* (1793), 5 Term Rep. 278; *R.* v. *Moseley* (1798), 5 East 224*n*).

The courts have, however, evolved certain limitations and exceptions to this general principle. Thus, when the putative father of an illegitimate male child, whom he had previously deserted, retook possession of him from the local guardians to whom he had been entrusted, it was held that it was proper for the guardians to surrender him (*Ex parte St. Mary Abbotts, Kensington, Guardians; Re an illegitimate child* (1887), 51 J.P. 740).

An example of lawful custody which the law will protect is shown by the case of *R.* v. *Cornforth* (1742), 11 East 10, where a man had taken from another man's custody his illegitimate daughter aged fifteen, and it was held that the putative father had a right to the care and education of his child and the law of abduction applied.

Another exception to the general principle is found in the case of *Re Lloyd* (1841), 3 Man. & G. 547, where it was held

that an illegitimate girl of between eleven and twelve years of age had reached sufficient years of discretion to elect between father and mother and that, she having chosen her father, the court would not allow the mother to interfere with that choice.

If there is a general principle running through these exceptions to the general rule, it is probably that of welfare of the child, and therefore in making an order under s. 1 of the Guardianship of Infants Act, the magistrate may have been applying to the facts before him a principle inherited as part of the common-law tradition and now finding expression in statute.

What is interesting is that these proceedings have been brought under s. 1 of the Act and not under s. 3 (1), which extends and amends s. 5 of the 1886 Act. Section 5 of the earlier Act reads: "The court may, upon the application of the mother (who may apply without next friend) make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father . . ." Section 3 (1) reads: "The power of the court under section 5 of the Guardianship of Infants Act, 1886, to make an order as to the custody of an infant and the right of access thereto may be exercised notwithstanding that the mother of the infant is residing with the father of the infant."

For these sections to operate it would be necessary to show that the term "father" in s. 16 of the Administration of Justice Act, 1928, included a putative father, who would thus be entitled to bring proceedings under the Guardianship of Infants Acts, and that the term "infant" in the latter Acts included bastard children. These meanings are arguable, but it might not be possible to sustain such arguments in the light of decided cases and construction of the statutes themselves, and the result might be at variance with the merits of the case. Fortunately, however, proceedings have been brought under s. 1 so that any argument to stretch the meaning of words is avoided.

It is worth noting, however, that the High Court recently had occasion to consider whether the term "children" in s. 26 of the Matrimonial Causes Act, 1950, applied to illegitimate children. In *Packer* v. *Packer* [1953] 3 W.L.R. 33; *ante*, p. 403, a mother applied to the court for custody and maintenance in respect of an illegitimate child, after obtaining a decree of divorce against the father, who had been married to another person at the date of the child's birth. It was held by a Special Commissioner, following *Harrison* v. *Harrison* [1951] P. 476, that he had no jurisdiction to make the order as the section only applied to legitimate children. It was held on appeal, the court being equally divided in opinion, that the decision of the judge below would stand and the appeal would be dismissed. Denning, L.J., would have been prepared to make such an order, despite the absence of authority, and considered it anomalous that the powers of other courts should extend to illegitimate children, while those of the Divorce Court did not.

The decision of the learned magistrate in taking the initiative in thus resolving a point of uncertainty in the law will meet with the approval of all members of the legal profession.

R. M. H.

A Conveyancer's Diary

CHARITABLE TRUSTS (VALIDATION) BILL

THE object of this Bill, according to the explanatory memorandum which is printed with it, is to validate certain trusts contained in instruments taking effect before the 16th December, 1952. (That was the day on which the report of Lord Nathan's committee on the law and practice relating to charitable trusts, which was the subject of several articles in this Diary at the beginning of this year, was published. The date has no other significance.) This is a clear and definite object, but some of the contents of the present Bill are otherwise.

The contents of cl. 1 are described in the marginal note to this clause as the "validation and modification of imperfect trust instruments," and this expression "imperfect trust instrument" is defined in cl. 1 (1) to mean any provision declaring the objects for which property is to be held or applied, and so describing those objects that the property could, consistently with the terms of the provision, be used exclusively for charitable purposes but could also be used for purposes which are not charitable. It appears from cl. 1 (2) that the provision envisaged is one contained in a written instrument of some kind. Such provisions could doubtless take many forms, but by and large they would, I think, be likely to fall into one of three distinct categories. These would be (1) a gift by will or instrument *inter vivos* to trustees for such charitable or benevolent objects as the trustees may select; or (2) a trust deed enabling the trustees thereof to apply any property devoted to the purposes of the deed for such charitable or benevolent objects as they may select; or (3) the memorandum of association of a limited company authorising the company to apply its property for such charitable or benevolent objects as it may select. Under the terms of a "trust instrument" of any of these categories, the trustees or the company, as the case may be, could properly apply the trust funds or the company's property for a purely charitable purpose, e.g., the rendering of financial assistance to a hospital; but the trustees or the company could equally properly apply such funds or property for a benevolent but non-charitable object, e.g., the rendering of financial assistance to a sports club. In this respect these categories are precisely the same. But in another, and not unimportant respect, there is a difference between a trust instrument of type (1) on the one hand and a trust instrument of either type (2) or type (3) on the other, and that is that while the former both operates to transfer to the trustees property which they will hold on certain trusts and also declares the trusts on which that property is to be held, the latter only declare the trusts on which the trust funds or the company's property (wherever they or it will come from) will be held. A trust instrument of type (1) is a "disposition" of property as well as a declaration of trust: trust instruments of types (2) or (3) are only declarations of trust.

This distinction's importance is immediately apparent when cl. 1 (2) of the Bill is examined. Under this sub-clause, any imperfect trust provision contained in an instrument taking effect before the 16th December, 1952, is to have, and to be deemed to have had, effect in relation to "any disposition or covenant" to which the Act is to apply (*a*) as respects the period before the commencement of the Act, as if the whole of the declared objects were charitable, and (*b*) as respects the period after the commencement of the Act, as if the

provisions (i.e., the "imperfect trust provisions" already defined) had required the property to be held or applied for the declared objects in so far only as they authorise use for charitable purposes.

This sub-clause forms the link between cll. 1 and 2, the latter of which provides (sub-cl. (1)) that the Act is to apply to (*a*) any disposition of property to be held or applied for objects declared by an imperfect trust provision, and (*b*) any covenant to make such a disposition, where apart from the Act the disposition or covenant is invalid under the law of England and Wales but would be valid if the objects were exclusively charitable. (There is an exception to this definition of the dispositions and covenants to which the Act applies which, however, as it does not go to the root of what cll. 1 and 2 seek to do, I will leave for the moment.)

The requirements which have to be fulfilled, therefore, before this measure can come into operation, are that (*a*) there must be an imperfect trust provision, (*b*) there must also be a related disposition or covenant, and (*c*) the disposition or covenant must be invalid under the law of England and Wales, apart from the Act, but must be such as would be valid if the objects declared by the related trust instrument were charitable. This accumulation of requirements has some curious results.

Taking the case of a trust instrument of type (1), e.g., the will of a testator who died in 1950, the effect of the Bill is clear enough. If the trustees have, in the period before the commencement of the Act, applied the testator's trust funds for benevolent but not charitable purposes (e.g., by making a gift to a sports club), it will be impossible, subject to the limitations contained in cll. 3 and 4 of the Bill, for the next of kin to attack this gift, as was done in the *Diplock* case, on the ground that the trust declared by the testator was wholly void; the trustees' gift, in such a case, would in effect be deemed to have been made for charitable purposes. As regards the period after the commencement of the Act, the testator's trust will, in effect, be statutorily reformed by the excision (in the example given) of the words "or benevolent," so that the trust will become a trust for such charitable objects as the trustees may select. This is, of course, in every way a valid trust, but the trustees will then have to confine the selection of objects to charitable objects, and if they should apply any part of the funds for non-charitable objects, their actions will be liable to be reviewed by the court at the suit of the Attorney-General.

When we come to the effect of cll. 1 and 2 of this Bill on trust instruments of type (2) or (3), however, the result appears to be very odd. A disposition of property to a body of trustees holding property, or inviting people to provide them with property to hold, on the trusts of a deed which authorises the application of the property so held for non-charitable as well as for charitable purposes is not, normally, invalid: the only circumstances in which such a disposition, in the language of cl. 2 (1), "is invalid under the law of England and Wales, but would be valid if the objects were exclusively charitable" would be if the disposition were limited to take effect outside the perpetuity period, and then only by way of gift over from some other charity or charitable purpose. The case of a disposition to a company with a memorandum of the kind I have referred to as type (3) is for this purpose the same. Similarly, the validity of a covenant to make a disposition can be affected only in the most extraordinary circumstances by the quality, from the point of view of their being charitable or not, of the objects for which the property to be comprised in the disposition is to be applied.

It is difficult to see the purpose of these provisions in their present form. They are not adequately explained in the memorandum on the Bill, and to the best of my recollection distinctions of this complex character had no place in the sections of the Nathan report on which, according to the view expressed in the memorandum, these provisions are now being fathered by the Government. There is no other provision in the Bill which appears to shed any light on this difficulty. Clauses 3 and 4, as I have said, limit the operation of cll. 1 and 2, but do not explain it. Clause 2 (2) provides that the Act is not, generally, to apply to a disposition or covenant which before the 16th December, 1952, has been treated as invalid on the ground that the objects declared by the related imperfect trust instrument are not exclusively charitable (there is a qualification to this which I need not go into now), but this provision does not affect the point I have sought to make. Some further explanation of what it is that this Bill is intended, in its present form, to do, will be welcome before the proposals it contains go much further.

"A B C"

Landlord and Tenant Notebook

UNCERTAIN NOTICE TO QUIT FARM

THE method by which the Agricultural Holdings Act, 1948, confers security of tenure differs both from that used to protect homes by rent control legislation and that used for the protection of business tenants by the Landlord and Tenant Act, 1927, Pt. I. The Rent Acts simply deny the landlord a remedy by depriving the courts of the jurisdiction which they would otherwise enjoy. The Landlord and Tenant Act, 1927, provides for the creation of a lease which the landlord may be unwilling to grant. But the Agricultural Holdings Act, 1948, after insisting that tenancies, whether periodic or for fixed periods, shall not expire unless and until notice to quit is given and expires, enacts that when such a notice is given by the landlord it may, unless certain conditions be or have been fulfilled, have no effect. "The ancient script of the common law," as Denning, L.J., said in his short judgment in *Cowan* v. *Wrayford* [1953] 1 W.L.R. 1340 (C.A.); *ante*, p. 780, "has been over-written by the statute, and the two have to be integrated together."

The parties in that case were landlord and tenant of some fields, the tenancy apparently being a yearly one running from Christmas, and on 29th September, 1951, the plaintiff's agents served a notice on the defendant which alleged that the defendant had broken a number of covenants and called upon him to remedy them by "21st December, 1952." The "1952" was (it was inferred) a mistake for "1951" (incidentally, the "s. 21 (1)" in the top line of p. 1342 of the All England Report must be a misprint for "s. 24 (1)"), but as one of the remedies it called for was the cleaning and proper cultivation of a particular field, a job which (as Romer, L.J., said) could be done in a short space of time but could be done much more efficiently in a long space of time, the tenant could take the document to mean what it said.

One of the conditions which debar a tenant who is served with notice to quit from serving a counter-notice which will by virtue of the Agricultural Holdings Act, 1948, s. 24 (1),

make the notice to quit of no effect without Ministry consent is: "at the date of the notice to quit the tenant had failed . . . within a reasonable time or within such reasonable period as was specified in the notice to remedy any breach by the tenant that was capable of being remedied of any term or condition of his tenancy which was not inconsistent with the fulfilment of his responsibilities to farm in accordance with the rules of good husbandry, and it is stated in the notice to quit that it is given by reason of the matter aforesaid." These conditions are set out in s. 24 (2).

On 22nd December, 1951, the tenant received a document headed: "Notice to quit by landlord to tenant stating reasons under s. 24 (2). I, the undersigned, hereby give you notice to quit and deliver up on the 25th day of December, 1952, possession of the holding known as . . . This notice is given for the following reasons: That you have failed to remedy the breaches of your tenancy agreement as set out in a notice served on you on 29th September, 1951."

The tenant's reaction was nil. He served no counter-notice under s. 24 (1); he did not seek arbitration requiring the truth of the allegations to be so tested, as is provided for by s. 26 and the Agriculture (Control of Notices to Quit) Regulations, 1948. According to the statement of facts, he apparently treated the notice of 29th September—the earlier notice, that is—as merely a notice to remedy certain defects; which is, of course, quite plausible, as such a notice does not have to draw attention to the fact that it may be the foundation of a right to possession. I would suggest, however, that masterly inactivity would afford an equally plausible explanation.

The action (for possession) was launched in the county court in February, 1953, the plaintiff simply relying on the fact that nothing had happened to render his notice to quit ineffective. The learned judge dismissed the claim on the ground that the landlord had "elected to proceed under s. 24 (2)."

The Court of Appeal upheld the decision for a different reason: they considered that the notice to quit given was, in the circumstances, bad for uncertainty. "In the circumstances" because, taken by itself, it would be a perfectly good notice to quit at common law. But it did not, Somervell, L.J., said, "bring home to the tenant in clear and unambiguous language that the landlord was intending to terminate the tenancy subject to s. 24 (1), irrespective of any breaches committed by the tenant," and if the tenant assumed that the landlord's agents had read the first document, on which the second one was based, he might well have concluded that this was "an attempt in advance to bring about a termination if, and only if, he did in fact fail to remedy in the time which the earlier notice had given"; in which case, the learned lord justice said, it would probably fail as being conditional.

Somervell, L.J., said earlier in his judgment that the difference between an ordinary notice unchallenged by the tenant and a notice under s. 24 (2) (*d*) was not only one of procedure, but one in which the financial consequences would differ, the tenant losing his right to compensation for disturbance in the latter case (see s. 34 (1), proviso); and Denning, L.J.'s judgment includes the statement "under the whole s. 24 he [the landlord] must make it clear whether he is proceeding under subs. (1) or subs. (2)." This statement goes, I respectfully suggest, farther than was necessary for the purposes of the decision; for the notice to quit finally impugned was headed: "Notice to quit by landlord . . . stating reasons under s. 24 (2), etc.," and specifically referred to the breaches complained of in the earlier notice. A landlord giving a plain notice does not, strictly speaking, "proceed under subs. (1)"; he lands a ball fairly in the tenant's court and scores if the tenant does nothing; and if such a notice had been served by the plaintiff in *Cowan* v. *Wrayford* the question whether the tenant could have established that it was not clear or was ambiguous might have been a more delicate one.

Indeed, it might well be suggested that the landlord would have been in a better position if he had not been over-anxious at the very beginning and then said more than was necessary. For s. 24 (2) set out above enables a landlord who complains of a remediable breach to require his tenant to remedy it "within a reasonable time or within such reasonable period as was specified in the notice to remedy, etc." This clearly gives the landlord the option of pre-estimating the amount of time it will take to put things right or leaving that question open, so that if the notice served on 29th September, 1951, had said "within a reasonable time from service hereof" instead of "by 21st December, 1952," the plaintiff, at all events if the breaches had included such as could reasonably have been remedied by 21st December, 1951, have been in a better position.

Romer, L.J.'s reasoning, in which he considered that the reference, in the notice to remedy, to cleaning up and properly cultivating part of one field would prevent the tenant from suspecting a wrong date, recalls a point suggested by the late Mr. Aggs in his note to the subsection. Paragraph (*d*) is followed by a paragraph dealing with certain breaches "not capable of being remedied." Mr. Aggs considered this phrase "rather obscure, as it is difficult to think of any breach which could not be remedied by the expenditure of money or time, or both" but suggests that "for practical purposes what is possibly intended is a breach that could not properly be remedied within the currency of a twelve-months' notice to quit." Which would mean that if the tenant had read and agreed with this suggestion, he ought to have been bewildered after all, being left wondering why para. (*c*) had not been cited.

The suggestion, while not perhaps applicable, without modification, to a long lease with covenants to grow orchards or even asparagus, accords in turn with the reasoning by which, in *Rugby School* v. *Tannahill* [1935] 1 K.B. 87 (C.A.), Maugham, L.J., interpreted the "if the breach is capable of remedy" in the Law of Property Act, 1925, s. 146 (1) (forfeiture notices), as meaning "capable of remedy within a reasonable time. The lessor is not to be kept out of his right of action for an unreasonable time"; which was applied by Morris, J., in *Egerton* v. *Esplanade Hotels, London, Ltd.* [1947] 2 All E.R. 88, after recognising that the "beneficent effects of time" might efface the memory of unhappy and unpleasant things. There are, of course, differences between the objects of the two enactments, but if in the one case the ancient script of the common law has been over-written by statute, in the other it was first over-written by equity and then rewritten by statute.

R. B.

Mr. and Mrs. Alpheus Ralph Robotham, of Derby, have celebrated their golden wedding. Mr. Robotham has been a solicitor since 1900.

Mr. Herbert George Derwent Moger, solicitor, of Taunton, Wiveliscombe, Stogumber, Langport and Bampton, is retiring from the post of Registrar of Bridgwater County Court.

HERE AND THERE

PUTTING THE CLOCK BACK

BECONTREE had better look out. Any minute now the tocsin will sound and it will find war declared on it by the psychiatrists, the Forward Society for Penal Regeneration and the League for Kindness to Little Things, for a very dangerous idea has got at large in Becontree and were it to run wild (as ideas will) it might well imperil a whole vast tract of territory at present occupied by the best modern thought in criminal science. The fact is that the juvenile court in Becontree has been (it would seem) guilty of the supreme treason in the atomic age; it has put the clock back and is firmly of opinion that the clock goes all the better for the change, as, it is said, some clocks will if they happen to have been running fast. In the welter of new and newish theories about the treatment of children, the court has been discovering a very old theory, not only discovering it but acting on it, not only acting on it but according it a primacy. Quite simply this juvenile court has discovered that, psychiatry or no psychiatry, naughty children are, on the whole, better kept in order by their unqualified parents than by highly qualified experts in their mental processes. That, at any rate, would seem to be the conclusion to be drawn from the annual report of the chairman of Becontree's juvenile court panel. For the past three years it has been working on the principle of bringing the punishment of children home to their parents. It was felt that as long as the doings of the juvenile court remained a vague something floating about in the middle distance, short-sighted parents were quite happy to shut their eyes to them. But once the problems of punishment came seeping into the home itself, they usually called forth the same urgency in correction that most people accord to a chimney on fire or a leaky roof. Fines could be strictly enforced; parents could be made to stand surety for their child's good behaviour; the glare of publicity could be turned on carefree little perpetrators of crimes like cruelty or wilful damage. And how has it worked? For the first time in five years juvenile offences have decreased and that by 14 per cent. And one of the foremost causes in the decrease has been the influence of the mother in the home. The policy of teaching behaviour in the home is said to have brought out the simple lesson of what was right and what was wrong, and this had proved more successful than "finding psychiatric excuses." Of course, everybody but the experts in child psychology knows what little "sea lawyers" children are. In the armoury of their excuses the "psychiatric excuse," as compared with the old worn-out excuses that had served their grandparents, became as atomic weapons are to bows and arrows. If the grown-ups stop playing that game there really will be for the children no alternative to the choice between being good and being bad. Back will come free will and its exacting exercise, instead of the cushioned luxury of invoking determinism and the inevitable and the self-conscious pleasure of being a psychological case. I'm afraid the report also has an uncomfortable little twist for the believers in education by pleasure and leisure. Serious offences, especially wilful damage, show a marked increase during the long summer and the Christmas holidays, and the report asks dubiously: Are long holidays really necessary?

NO STANDARD MAN

PEOPLE are always expecting the law to be cut into precise predetermined patterns ready for the customer the minute he comes into the shop. But those who think that way have never deliberately asked themselves what is the job that law is really meant to do. Law provides the social garment that each of us must wear all his life and a standardised fit would only work on standardised human beings, on human ants and bees; for everyone else it would be a straitjacket. Even the multiple tailors work on principles of flexibility and they are working within roughly foreseeable limits, for after all within a matter of a few inches this way and that their customers are roughly the same shape and size and they wear their arms and legs and torsos approximately in the same relationship to one another. But spiritually and mentally human beings are so wildly dissimilar that even the most flexible law can provide only rough justice. And that isn't true only of the great crimes and *causes célèbres*. Half a day in any police court is enough to make it good. Just take three recent cases picked out at random. Here's one at the North London court. An epileptic piano maker was charged with stealing 7 cwt. of lead from the roofs of three schools. He asked for twelve similar offences to be taken into consideration. Here he was, subject to fainting fits, climbing up and up, sometimes as high as 60 feet, showing quite astonishing courage, and all the time he could not hold a job because of ill-health. Even in that queer context apparently "it is an easier thing to be heroic than to be just and good." The law sent him to prison for six months. Another human curiosity, at Marlborough Street this time. A thirty-one-year old accountant of excellent character tried to steal a 10d. tube ticket and 1s. 2d. change by using a halfpenny in an automatic machine. But the coin did not operate it and he was arrested. The coin did not belong to this "press-button" age of ours. It had been in circulation for 200 years, since the time of George II, and in fact was worth 3s. "I suppose you didn't know that," said the magistrate. "No," replied the accused ruefully, "I didn't know they were worth that much." The numismatic lesson cost him £2, but it may have been worth it. I hope he got his coin back. Then at the Bromley Magistrates' Court there was the gentleman who posted a packet of discarded sandwiches to Dr. Edith Summerskill, M.P., with political intent, a sample, he said, of the food which building manual workers were throwing away on a site near his home. This controversial rejoinder to certain observations the lady had made recently to the Press reached her only by a circuitous route, passing first through the House of Commons and finally to her home. It deteriorated in transit to such an extent that the sender was prosecuted and fined £3 for sending through the post "a noxious substance." Noxious substances used formerly to play a well recognised part in political controversy, but on the hustings rather than through Her Majesty's mails. However, the accused maintained his was a very different and far more benevolent aim than that of the old-fashioned egg or tomato or dead cat thrower. "My intention," he declared, "was not to offend but to educate the lady." She has returned the service with a minor lesson in law.

RICHARD ROE.

The annual CROYDON COURTS dinner and dance (now organised jointly with the CROYDON LAW SOCIETY) was held on 27th November. His Honour Judge Rice-Jones presided. The company, nearly 300 in number, included Their Honours Sir Gerald Hurst, Q.C., Judges Tudor Rees, Gordon Clark and Glazebrook, the Mayors of Croydon, Beddington and Wallington, the Chairmen of County and Borough Benches, and the Presidents of the Croydon, Mid-Surrey and Hastings Law Societies, together with many other justices, advocates and officials.

TALKING "SHOP"

SHAKESPEARE REVISITED

December, 1953

Just in case you should happen to have missed the Natural Laws (Miscellaneous Provisions Continuance) Act, 1953—and what with all this new legislation it's a fair bet that you did—I am happy to announce that Mr. Plum has lent me an advance copy of his commentary upon it. He feels confident of going to press well ahead of his young rival, Gooseberry, who has been shamelessly deferring to natural laws by snatching three or four hours' sleep every night and really cannot stand the pace.

Well, here it is, with kind acknowledgments to Mr. Plum :—

SECTION 1

All the world's a stage
And all the men and women merely players :
They have their exits and their entrances ;
And one man in his time plays many parts,
His acts being seven ages.

Plum, naturally, has a good deal to say about this, but I find his comments rather prosy, so I suggest that we skip them and go on to s. 2.

SECTION 2

At first *the infant*,
Mewling and puking in his *nurse's arms*

Infant

A person under twenty-one years of age, whose acts are in many cases void or voidable : *per* Wharton's Law Lexicon, 14th Edition, at p. 508 : distinguish voidable and avoidable (*infra*) ; *cf.* (Scots Law) pupilarity and minority. As to handicapped pupils, see last note on this section, *infra*.

Mewling and Puking

Mew, mewl, mule, miaow, miaul, vv.i.—cry like cat, or (mewl, mule, miaul) baby : *per* Plum's Pocket Oxford Dictionary. (Distinguish muta canum (Fr. meute)—a mew or kennel of hounds.) *Puke*, stated, disgustingly, *ibid.* to be v.i. *and* t.

As to trespasses by infants, see "Children as Trespassers," 97 SOL. J. 690. As to responsibility of custodian for tort of infant, see *Lewis* v. *Carmarthenshire C.C.* [1953] 1 W.L.R. 1439 ; *ante*, p. 831 (child running into road and causing fatal accident to lorry-driver). But *cf. Rich* v. *London C.C.* [1953] 1 W.L.R. 895 ; *ante*, p. 472, C.A. (child aged seven throwing lump of coke at infant plaintiff).

Nurse's Arms

As to handicapped pupils, see the Handicapped Pupils and School Health Regulations, S.R. & O., 1945, No. 1076.

SECTION 3

And then the whining schoolboy, with his satchel,
And shining morning face, creeping like snail
Unwillingly to school.

Unwillingly to School

See Education Act, 1944, s. 39 (2) (*c*), (5), and s. 55. And see *Surrey C.C.* v. *Ministry of Education* [1953] 1 All E.R. 705 : "to and from school" in that context means from and to the child's home to and from the school. Obligation of local authority to provide school transport, nature of and how satisfied, *ibid.* ; parents' defence on charge of truancy having regard to same, *ibid.* *Cf.* "wandering in the public streets" : s. 3, Vagrancy Act, 1824 ; *Carnill* v. *Edwards* [1953] 1 W.L.R. 290 (but on second thoughts I shouldn't bother—Plum's Ed.). And *cf.* schoolgirls, regulation school costume, right of headmistress to prescribe latter, refuse admission of former in slacks : *Spiers* v. *Warrington Corporation*, public press *passim* and [1953] 2 All E.R. 1052. And *per* Goddard, L.C.J., *ibid.*, at p. 1056 : "One cannot suppose that a headmistress or headmaster would be obliged to admit children to school wearing no clothes at all."

SECTION 4

And then the lover,
Sighing like furnace, with a *woful ballad*
Made to his *mistress' eyebrow*

Woful Ballad

Any householder within the Metropolitan Police District may require any street musician or street singer to depart from the neighbourhood of the house of such householder on account of the illness, or on account of the interruption of the ordinary occupations or pursuits of any inmate of such house, or for other reasonable or sufficient cause : see the Metropolitan Police Act, 1864 (an Act "for the better regulation of street music within the Metropolitan Police District"). As to penalty for persistence, *ibid.*, as amended. Penalty not incurred unless householder states his reasons for requiring departure of performer : *Shields* v. *Howard* [1897] 1 Q.B. 84. Query, whether "woful" is to be construed as deplorable in quality or indicative of woe ; and whether, upon either construction this would offend *ejusdem generis* with conduct aggravating illness, causing disturbance, etc., of occupants (*vide* text) : in practice the householder may be well advised to plead illness, which is not usually difficult when the music is discordant or singer off pitch, using this term in a vocal, not a geographical sense.

Mistress' Eyebrow

As to whether a mistress is "a member of the tenant's family" within the meaning of s. 12 (1) (*g*), Rent and Mortgage Interest Restrictions Act, 1920, see *Brock* v. *Wollams* [1949] 2 K.B. 388, C.A. And *per* Cohen, L.J. (*ibid.*, at p. 395) : "The question the county court judge should have asked himself was this : 'Would an ordinary man, addressing his mind to the question whether Mrs. *W* was a member of the family or not, have answered 'yes' or 'no'?'." See also *Hawes* v. *Evenden* [1953] 2 All E.R. 737, C.A., and an article, *ante*, p. 667 : "They All Lived Together as a Family." *Sed quaere*, whether the "ordinary man" is to be equated with the "reasonable man," and if so, whose eyebrows, if any, would be lifted (i.e., raised, not rased), assuming (*a*) ordinary (*b*) reasonable knowledge of the facts of these two cases.

SECTION 5

Then a soldier
Full of *strange oaths* and *bearded* like the pard,
Jealous in honour, sudden and quick in quarrel,
Seeking the bubble reputation
Even in the *cannon's mouth.*

Strange Oaths

Blasphemy : see 9 Wm. 3 c. 35, commonly called the Blasphemy Act : *R.* v. *Carlile* (1819), 3 B. & Ald. 161, and *Re Bowman* [1915] 2 Ch. 447. Amongst the severe penalties imposed by this Act for a second offence, the offender "shall be disabled to sue prosecute plead or use any action or information in any court of law or equity or to be guardian of any child or executor or administrator of any person or capable of any legacie or deed of gift . . ." But it is said that no prosecutions have been instituted in modern times.

Swearing : profane swearing and cursing an offence punishable summarily by fine under the Profane Oaths Act, 1745 (19 Geo. 2 c. 21), at the rate of one shilling a day for every day-labourer, common soldier, sailor or seaman ; two shillings a day for every other person under the degree of gentleman ; five shillings a day for every person of or above the degree of gentleman. *Sc.*, that solicitors, though not, as such (*per* Plum) of the five orders of chivalry, are chargeable at the highest rate. Though flow of disorderly language

may be continuous over a period, probably diurnal charge not a periodical payment from which income tax can be deducted at source. See also *R.* v. *Scott* (1863), 33 L.J.M.C. 15 (fine of £2 for twenty oaths uttered in one day, held good).

As to cursing and swearing on a golf-course (provocation of pastime: held no *mens rea*) see *Rex* v. *Haddock, rep.* Misleading Cases in the Common Law, at p. 16. *Per* the stipendiary in that case, citing the poet Shakespeare ("the Prince of Darkness is a Gentleman"): "Quotations from Shakespeare are generally meaningless and always unsound" —*sed quaere.*

As to possible application of the Act to women, see Interpretation Act, 1889. And *cf. In the Estate of Stanley* [1916] P. 192 (nuncupative will made by nurse on leave but under orders to re-embark in war-time on hospital ship: held privileged as a soldier's will within Wills Act, 1837, s. 11).

Bearded . . .

See Queen's Regs., Section X, para. 1003. "The hair of the head will be kept short. The chin and underlip will be shaved. Whisker, if worn, will be of moderate length." Query, as to Pioneer Sergeants. See also *Re Rob Roy, ex rel.* Walt Disney.

Seeking . . . even in the cannon's mouth

Widows, disposal of, on arrival from abroad: see Queen's Regs., Section XI, para. 1246.

SECTION 6

And then the justice,
In fair round belly with *good capon lin'd*,
With eyes severe and beard of formal cut,
Full of *wise saws* and modern instances,
And so he plays his part.

Good Capon Lin'd

Capons were, it is said, formerly given to magistrates in hope of favour: hence the scurrilous but privileged statement of a member of the House of Commons in 1601, who declared that a justice of the peace would dispense with a dozen penal statutes for half a dozen chickens.

Wise Saws

Of Dough, J., disapproved in Court of Appeal: see clever advance reporting of *Re Crump, ante*, p. 698.

SECTION 7

The sixth age shifts,
Into the lean and slipper'd *pantaloon*,
With *spectacles* on nose and *pouch on side*,
His *youthful hose* well sav'd *a world too wide*
For his shrunk shank, and his big manly voice
Turning again towards childish treble pipes
And whistles in his sound.

Pantaloon

"The breeches, trousers or underdrawers of various kinds (now often called *pants*) got their name from Pantaloon, a Venetian character in sixteenth century comedy, a lean and foolish old man dressed in loose kind of trousers and slippers. His name is said to have come from San Pantaleone (a patron saint of physicians . . .) and he was adopted by the later harliquinades and pantomimes as the butt of the clown's jokes": *per* Brewer's Dictionary of Phrase and Fable.

As to the association of these images with the judiciary, see under Contempt of Court: Halsbury, 2nd ed., vol. 7, p. 1, *et seq.*

Spectacles

See s. 41, National Health Service Act, 1946, and Pt. III of the National Health Service (Supplementary Ophthalmic Services) Regs., 1948 (S.I. 1948 No. 1273). Procedure for obtaining replacement or repair of: Pt. IV. Replacement where lack of care of: Pt. V.

Pouch on Side

As to relief for pensioners in respect of increase in tobacco duty: see s. 4, Finance Act, 1947, and regs. made thereunder.

Youthful Hose

Purchase tax on: see Finance Act, 1952, Sched. IV, Pt. IA, para. 18, and as to nylon hose, in case your wife may be interested, see the Women's and Maids' Nylon Hose (Maximum Prices) Order, 1950 (S.I. 1950 No. 582), as amended by S.I. 1950 No. 1004.

A World too Wide for His Shrunk Shank

But if in any such difficulty now possibly consult the Pin Hook, Eye and Snap Fastener Wages Council. (Did Plum invent this? No—Plum's Ed.)

SECTION 8

Last scene of all,
That ends this strange eventful history,
Is *second childishness* and mere oblivion,
Sans teeth, sans eyes, sans taste, sans everything.

Second Childishness

As to capacity to enter into a marriage contract, see *In the Estate of Park; Park* v. *Park* [1953] 2 All E.R. 408 (applying *Hunter* v. *Edney* (1885), 10 P.D. 95): the minds of the parties must be capable of understanding the nature of the contract into which they are entering free from the influence of morbid delusions on the subject. A lesser degree of mental capacity is required, it seems, to consent to a marriage than to make a will.*

Sans Teeth

Semble, that the fact that the jaw of a patient is fractured in the course of his having a wisdom tooth extracted is not of itself evidence of negligence against the dentist upon the principle of *res ipsa loquitur*. See *Fish* v. *Kapur* [1948] 2 All E.R. 176.

Well, there it is, and if Plum has missed a few points here or there, Gooseberry, it is to be hoped, will take care of them. And then, if the two of them do not disagree, the Act should be clear enough to everyone.

"ESCROW"

* Stigmatised on appeal (*ante*, p. 830) and in effect by Singleton, L.J., as a wrong approach and a valueless distinction, but without affecting the result.

Semble that Plum's statement more accurately epitomises the *Park* litigation than its effect on the law, and is not acceptable as a general proposition.

Practitioners must thus make what they can of the fact that Mr. Park failed in testamentary capacity within a few hours of contracting a valid marriage.—*Plum's Ed.*

Mr. Philip R. Bean, F.R.I.C.S., F.A.I., F.R.V.A., was appointed President of the RATING AND VALUATION ASSOCIATION for 1953–1954 by the Council of the Association on 4th December.

On Tuesday, 24th November, 1953, a joint moot was held at University College, London, in the Anatomy Theatre, between the BENTHAM CLUB, which is open to all graduates of the Laws Faculty, and the UNIVERSITY COLLEGE, LONDON, LAW SOCIETY. The moot concerned a problem in the law of defamation, and Ormerod, J., presided. Mr. I. Goldsmith, Barrister-at-Law, and Mr. B. Hargrove, Barrister-at-Law, represented the Bentham Club, and Miss E. Davies and Mr. S. Rayner appeared on behalf of the students.

SURVEY OF THE WEEK

HOUSE OF LORDS

Progress of Bills

Read First Time :—

Cinematograph Film Production (Special Loans) Bill [H.C.] [14th December.

Consolidated Fund Bill [H.C.] [16th December.

Read Second Time :—

Electoral Registers Bill [H.C.] [14th December.

Navy, Army and Air Force Reserves Bill [H.C.] [14th December.

Read Third Time :—

Armed Forces (Housing Loans) Bill [H.C.] [14th December.

Expiring Laws Continuance Bill [H.C.] [15th December.

Inverness Harbour Order Confirmation Bill [H.C.] [16th December.

National Museum of Antiquities of Scotland Bill [H.L.] [15th December.

HOUSE OF COMMONS

A. Progress of Bills

Read First Time :—

Baking Industry (Hours of Work) Bill [H.C.] [16th December.

To restrict night work in the baking industry, and for purposes connected therewith.

B. Questions

Vacant War-damaged Sites (Rights of Way)

The Solicitor-General declined to introduce legislation to prevent the acquisition by prescription of rights of way and other easements over war-damaged sites, which could not yet be redeveloped, in favour of adjoining buildings. It was not thought, he told Mr. Hay, that there was any serious risk. [14th December.

Residential Property (Owners' Identity)

The Solicitor-General declined to introduce legislation to require persons or companies resident outside the jurisdiction of United Kingdom courts and owning residential properties here to appoint identifiable persons resident in the United Kingdom against whom civil or criminal proceedings could be instituted when necessary. He pointed out that the Companies Act, 1948, imposed on overseas companies carrying on business in this country the duty to register here and to deliver a list of persons resident here who were authorised to accept service of process, and penalties were prescribed. To the complaint that tenants who won their cases against such companies could not even recover their costs he replied that it should not be difficult to get security for costs where companies carrying on business outside the jurisdiction ventured to bring proceedings in the courts of this country. [14th December.

Consolidation of Statute Law

In a statement on the work of the Statute Law Committee, the Solicitor-General said that as soon as the Food and Drugs Bill now before Parliament was passed it was intended to introduce a consolidating Bill on the subject. It was intended to introduce Bills to consolidate the Medical Acts and certain of the Acts relating to pharmacy in time to be passed during the present session, and it was hoped also to introduce a consolidation of Acts relating to savings banks. Work was now to be begun to put into order the very numerous and scattered enactments which constitute the statute law as to highways; this could not be limited to strict consolidation, because amendments would be needed for putting more than a century's continual legislation into intelligible and up-to-date form, but they would be limited to such as were needed for that purpose as distinguished from amendments of substance. This task would absorb much of the resources available for legislation of the kind which was the concern of the committee, but other consolidations of lesser but substantial importance were either in hand or had been authorised by the committee.

The next edition of the Index to the Statutes, which would extend to the end of 1954, was scheduled for April, 1955. [14th December.

Charitable Trusts (Legislation)

Referring to the introduction of the Charitable Trusts (Validation) Bill, which dealt with trusts intended to be charitable but including non-charitable purposes, the Attorney-General stated that the other recommendations of the Nathan Committee were still under consideration. [14th December.

Claims for Loss of Development Value

The Minister of Housing and Local Government said that the Valuation Office, as the agents of the Central Land Board, had been authorised to tell local authorities the amount of any admitted claims for loss of development value relating to land which they had bought or were proposing to buy. Information about admitted claims was also supplied to local authorities who were faced with applications for permission to develop and wished to estimate the cost of a refusal. Questioned by Mr. Hay as to the propriety of giving this information, the Minister said that it was only right that local authorities should know what claim they might have to meet. [15th December.

Town and Country Planning Bill

Mr. Harold Macmillan said that he hoped to introduce a Town and Country Planning Bill before Easter. [15th December.

Income Tax on Christmas Bonuses

The Chancellor of the Exchequer stated that this Christmas was the last at which he would authorise the application of the extra-statutory concession under which income tax was not charged on gifts in the form of savings certificates, savings stamps, National Savings gift tokens or direct credits to employees' savings bank accounts, made to subordinate employees by employers who had previously been in the habit of making Christmas presents in goods of an equivalent value. [15th December.

Juvenile Courts (Women Justices)

The Home Secretary stated that the Lord Chancellor proposed to amend the statutory rules so as to provide that all juvenile courts should contain at least one man and at least one woman, except in emergency, when a court might be composed of two men or two women. The new rule would have effect from the beginning of 1955. [16th December.

STATUTORY INSTRUMENTS

City of London Traffic (Old Broad Street) (Restriction of Waiting) Regulations, 1953. (S.I. 1953 No. 1802.)

Civil Defence (Grant) (Scotland) Regulations, 1953. (S.I. 1953 No. 1804 (S. 120).) 6d.

Control of Pyrites (Revocation) Order, 1953. (S.I. 1953 No. 1811.)

Controls of Sulphuric Acid and of Sulphur (Revocations) Order, 1953. (S.I. 1953 No. 1812.)

Eggs (Amendment No. 4) Order, 1953. (S.I. 1953 No. 1816.) 5d.

Flax and Hemp Wages Council (Great Britain) Wages Regulation Order, 1953. (S.I. 1953 No. 1806.) 8d.

Handicapped Pupils (Certificate) Regulations, 1953. (S.I. 1953 No. 1805.) 5d.

London-Edinburgh-Thurso Trunk Road (Greenloaning Diversion) Order, 1953. (S.I. 1953 No. 1795.)

London Traffic (Prescribed Routes) (No. 31) Regulations, 1953. (S.I. 1953 No. 1801.)

London Traffic (Prescribed Routes) (No. 32) Regulations, 1953. (S.I. 1953 No. 1815.)

Neath Rural District Council Water Order, 1953. (S.I. 1953 No. 1798.) 5d.

Newcastle - upon - Tyne - Edinburgh Trunk Road (Dalkeith Northern By-Pass) Order, 1953. (S.I. 1953 No. 1796.)

Petty Sessional Divisions (Staffordshire) Order, 1953. (S.I. 1953 No. 1817.) 5d.

Police Pensions Regulations, 1953. (S.I. 1953 No. 1800.) 5d.

Public Health (Preservatives, etc., in Food) (Amendment No. 2) Regulations, 1953. (S.I. 1953 No. 1820.)

Retention of Cables and Main under Highways (Wiltshire) (No. 2) Order, 1953. (S.I. 1953 No. 1794.)

Retention of Cables and Pipe under Highways (Devon) (No. 1) Order, 1953. (S.I. 1953 No. 1808.)

Retention of Cable, Mains and Pipes under Highway (Somersetshire) (No. 1) Order, 1953. (S.I. 1953 No. 1809.)

Stopping up of Highways (Staffordshire) (No. 6) Order, 1953. (S.I. 1953 No. 1810.)

Tendring Hundred Water Order, 1953. (S.I. 1953 No. 1813.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 102–103 Fetter Lane, E.C.4. The price in each case, unless otherwise stated, is 4d., post free.]

POINTS IN PRACTICE

Questions from solicitors who are REGISTERED ANNUAL SUBSCRIBERS are answered without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 102–103 Fetter Lane, E.C.4, and contain the name and address of the subscriber, and a stamped, addressed envelope.

Strict Settlement—CONTINGENT LIFE INTEREST—RAISING CAPITAL FOR CHILDREN'S EDUCATION

Q. A testator made his will in 1936, leaving his estate consisting of freehold property on trust for his widow for life, then to his daughter for life, and ultimately to the children of the daughter on attaining twenty-one, or in the event of there being no children to whomsoever the daughter shall by will appoint. From the terms of the will it is quite clear that this is not a trust for sale and therefore there can be no advancement of capital moneys to the remaindermen. One property has recently become vacant and is being sold by the tenant for life. The daughter has asked us if it is possible for her to use any of the capital for the purpose of educating her children. Under the present trusts this would appear to be impossible. On the death of the present tenant for life the property will vest in the daughter for life. Would it be possible for the daughter to surrender her life interest in part of the estate to trustees for the children, in order that capital could be raised for the use specified above ?

A. Although it would undoubtedly be possible for the daughter to surrender her life interest to trustees for the children, we are unable to see that any very useful result would be achieved. So long as the widow is alive the daughter's life interest is contingent upon her surviving her mother and would not provide a very tempting security to anyone asked to advance capital. It would, in any event, require the support of a life policy to protect the lender in the event of the daughter not surviving the mother, and also insuring the risk that the children might not attain twenty-one, and even so the lender would have little more than personal security, since, in the absence of an immediate life interest being available to be charged with the premiums, he would have to rely upon the covenants of the daughter and the trustees for the infants. In our opinion, a better course would be an application to the court, under either s. 57 of the Trustee Act, 1925, or the court's general equitable jurisdiction, for permission to apply part of the proceeds of sale of the house towards the children's education. We consider that such an application is likely to be granted if the consents of the widow and daughter are forthcoming. See generally *Re New* [1901] 2 Ch. 534 and Underhill's Trusts, 9th ed., p. 243.

Rent Restriction—INCREASE OF MORTGAGE INTEREST TO STANDARD RATE—PROCEDURE

Q. Clients of ours have a mortgage on a house which is subject to the Rent and Mortgage Interest Restrictions Act, 1939. The mortgage was originally created in 1928 and the rate of interest then reserved was 6½ per cent., reducible to 5½ per cent. on punctual payment. On 1st September, 1939, the rate of interest payable was 5¾ per cent., reducible to 4¾ per cent., the rate having been reduced by agreement, but no deed reducing the rate of interest was entered into. In 1946 the mortgage was transferred to our clients by means of a statutory receipt operating as a transfer, the rate of interest at that time having been further reduced to 5½ per cent., reducible to 4½ per cent., by agreement but without any deed. A few days after the transfer a deed was entered into by our clients with the borrower whereby it was agreed that the rate of interest should be 5 per cent., reducible to 4 per cent. The deed does not contain any fresh covenant for payment of interest. Is the standard rate of interest the rate payable on 1st September, 1939, or the rate payable under the deed of 1946 ? If the former, can the rate be now increased to 5¾ per cent., reducible to 4¾ per cent., without the consent of the mortgagor, and if so, what procedure should be adopted to effect the increase ?

A. The standard rate of interest is 5¾ per cent., reducible to 4¾ per cent., being the rate payable on 1st September, 1939 : Increase of Rent, etc., Act, 1920, s. 12 (1) (*b*), as amended by Act of 1939, Sched. I. The procedure for restoring the interest to the maximum permitted rate is, however, by no means clear (see the discussion in Megarry, 6th ed., p. 388, and " Law Notes " Rent Acts, 20th ed., pp. 63-65). Our opinion is that notice of increase should be given raising the rate of interest in respect of that due on the interest date next but one following the date of the notice. Thus, if interest is payable on the usual quarter days, a notice served before Midsummer would be effective if expressed to raise the interest due at Michaelmas. The interest due for the quarter ending Michaelmas will have accrued from day to day during that quarter, but all of it will have accrued after the service of the notice.

NOTES AND NEWS

Honours and Appointments

The Lord Chancellor has appointed Mr. JOHN FRANCIS BOWYER to be a Registrar in Bankruptcy of the High Court of Justice.

Personal Notes

A resolution of thanks to Sir Anthony Pickford, Town Clerk of the City of London since 1946, was carried by the Court of Aldermen, presided over by the Lord Mayor, on 8th December. Sir Anthony is retiring after thirty years' service with the City Corporation.

Miscellaneous

THE SOLICITORS ACTS, 1932 TO 1941

On 3rd December, 1953, an order was made by the Disciplinary Committee constituted under the Solicitors Acts, 1932 to 1941, that the name of HOWARD PALMER, of King's Court, 115–117 Colmore Row, Birmingham, 3, be struck off the Roll of Solicitors of the Supreme Court, and that he do pay to the applicant his costs of and incidental to the application and inquiry.

Wills and Bequests

Sir Frederick Hindle, solicitor, of Darwen, Lancashire, left £40,326.

OBITUARY

MR. M. A. BULKLEY

Mr. Maurice Arthur Bulkley, solicitor, of Sherborne, lately with the Great Western Railway Company, died on 14th December, aged 79.

CORRESPONDENCE

[*The views expressed by our correspondents are not necessarily those of* THE SOLICITORS' JOURNAL]

Charitable Trusts (Validation) Bill

Sir,—It may be worth pointing out that one effect of this Bill (referred to in your issue of 12th December) is to prevent the recurrence of anything like the notorious *Diplock* case where trusts for " charitable or benevolent " institutions were held void, so that £250,000 was stripped from charities (in the strictest legal sense) to which the executors had given it.

While the law applied was not questioned, there was a very general sense, shared by many lawyers, that a grave injustice was effected : one learned Lord Justice said " the decision has done more to bring the law into disrepute than any other single matter in recent years." Another would have liked retrospective legislation to restore the money to the charities.

The Bill happily overcomes the difficulties which the Nathan Committee saw in appropriate alteration of the law.

C. G. CONOLLY.

London, E.C.4.

" THE SOLICITORS' JOURNAL "

Editorial, Publishing and Advertising Offices : 102–103 Fetter Lane, London, E.C.4. Telephone : CHAncery 6855.

Annual Subscription : Inland £3 15s., Overseas £4 5s. (payable yearly, half-yearly or quarterly in advance).

Advertisements must be received first post Wednesday.

Contributions are cordially invited and should be accompanied by the name and address of the author (not necessarily for publication).